IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

STEVEN MICHAEL WEEMS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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STATEMENT OF THE QUESTION

I.

That a person's right to carry a firearm was restored is an affirmative burden-shifting defense in a felon-in-possession of a firearm case in Michigan. The trial court directed a verdict of acquittal, mistakenly finding that lack of restoration was an element of the offense. Where jeopardy is terminated on defense request on a misunderstanding of the law as to the elements of the offense and not because of a finding, "correct or not," of insufficient proof on one of the elements, does United States v. Martin Linen Supply Co, 430 US 564 (1977) compel the result that double jeopardy bars retrial, and if so, should that opinion be revisited?

Table of Contents

INDEX OF AUTHORITIES

Cases

Other

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NOW COMES the State of Michigan, by **KYM L WORTHY**, *Prosecuting Attorney for the County of Wayne*, and **TIMOTHY A. BAUGHMAN**, *Chief of Research, Training, and Appeals*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on September 23, 2004, leave denied by the Michigan Supreme Court on September 28, 2005.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. The order of the Michigan Supreme Court denying leave to appeal appears as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Respondent was charged with assault with intent to murder, being a felon in possession of a firearm, and felony-firearm. At trial Ms. Lisa Westwood, a department supervisor with the Department of Corrections, testified that on docket no. 91-1259 defendant was sentenced on March 6, 1991, to a term of 4-20 years for delivery of cocaine under 50 grams. He was paroled on October 10, 1994, and discharged from parole on October 12, 1996. R, 2-12, 8-9.

No proof that defendant's rights to carry a firearm were restored was offered by the defense. When jury instructions were discussed, the trial judge indicated that under the standard jury instruction the "fourth element" of the offense of felon in possession is that "defendant's right to possess has not been restored pursuant to Michigan law." R, 2-12, 68. The prosecutor indicated that restoration is an affirmative defense, requiring the defendant to come forward with proof of restoration before the prosecution had the burden of persuasion on the point. R, 2-12, 68-75. Defense counsel argued the prosecution had not "proved the elements of this crime which is that this defendant was ineligible to carry a firearm." R, 2-12, 71. The trial court purported to grant a directed verdict because the prosecution had not proven that defendant's "right to possess a firearm has not been restored pursuant to Michigan law." R, 2-12, 75. An order was entered to that effect. Petitioner appealed. The Michigan Court of Appeals affirmed on the basis that

> A trial court's ruling constitutes an acquittal for double jeopardy purposes if the ruling, regardless of the label given to it, represents a "'resolution, correct or not, of some or all of the factual elements of the offense charged.'" *People v Nix*, 453 Mich 619, 627; 556 NW2d 866 (1996), quoting *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977). The phrase

"correct or not" refers to 'all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong *with respect to whether a particular factor is an element of the charged offense.*'"

Slip opinion, at 2; see appendix A..

Petitioner's application for leave to appeal was denied by the Michigan Supreme Court on September 28, 2005. Appendix B.

Reasons for Granting the Writ

A. Introduction

One thing is clear in this case: no defense wish to have this case determined by the jury was thwarted, the defense seeking—successfully—to avoid a jury resolution of the case by having the trial judge take it from the jury. The case involves no attempt to harass the respondent through repeated prosecutions, as all the petitioner seeks is one full and fair opportunity to have the case decided by a jury.

One convicted of certain specified felonies in Michigan may not again carry a firearm unless and until certain conditions are met, one being that the local gun board must restore that person's right to carry a firearm. See MCL 750.224f(2). The restoration provisions of the statute constitute an affirmative burden-shifting defense, "lack of restoration" not being an element of the offense the prosecution must prove:

> Defendant here produced no evidence to establish that his right to possess a firearm had been restored. Because defendant failed to meet his burden of production, the prosecution was not required to prove the lack of restoration of firearm rights beyond a reasonable doubt.
>
> *People v. Perkins*, 473 Mich 626 (2005)

The trial of this matter was aborted, then, on defense request, on the conclusion of the trial judge that the prosecution had not presented evidence as to a matter that is not an element of the offense. And yet the Michigan Court of Appeals has found retrial precluded by this Court's decision in *Martin Linen Supply*, reading this Court's statement that an acquittal for purposes of double jeopardy is "a resolution,

correct or not, of some or all of the *factual elements* of the offense charged" to include the "factual" decision of "whether a particular factor is an element of the charged offense." But whether something is an element or an affirmative defense is not a "factual matter"; rather, it is a question of law. Where determined incorrectly, and the trial aborted on that basis, the trial has been aborted not on the basis of a "judicial acquittal," barring retrial, but on an error of law. This is a recurring misconstruction of this Court's opinion in *Martin Linen Supply* needing correction by this Court; if not a misconstruction, then *Martin Linen Supply* should be revisited.

B. The Prohibition On Retrial After Acquittal: "A Resolution, Correct or Not, Of Some or All of the Factual Elements of the Offense"

Given that the Fifth Amendment to the federal constitution provides, in terms that admit of no exceptions, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...," the question arises as to the justification for *ever* allowing retrials for any reason. The answers must be found in history, logic, and sound policy, for as Justice Holmes, writing for the Court in *Gompers v United States*, 233 US 604 (1914) observed long ago, "the provisions of the Constitution are not mathematical formulas...; they are organic, living institutions transplanted from English soil....(whose significance and scope must be determined) not by simply taking the words and a dictionary, but by considering their origin and the line of their growth."

The prohibition in the federal constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of autrefois acquit and autrefois convict. Blackstone stated that

> ...the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is

> to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once ***fairly*** found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime (emphasis added).
>
> 4 Blackstone's Commentaries 335.

Blackstone also observed that the:

> ...plea of autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man out to be twice brought in danger of his life for one and the same crime....
>
> 4 Blackstone's Commentaries at 329-331.

These pleas in bar were a reaction to generatic s of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal." See "The Double Jeopardy Clause of the Fifth Amendment," 26 Am Crim L Rev 1477, 1479 (1989).

This tradition of the pleas in bar of autrefois acquit and autrefois convict, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists, see e.g. the Massachusetts Body of Liberties of 1641. New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No